

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES ALAN POTTER &	:	CIVIL ACTION
GALE L. POTTER	:	
	:	
v.	:	
	:	
JOSEPH HOFFMAN, JR.,	:	
MICHAEL WAYNE D'AMICO &	:	
BETTY LOU D'AMICO	:	NO. 98-406

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

November 24, 1998

Plaintiffs James Alan Potter ("Potter") and Gale L. Potter ("Gale Potter")¹ filed an action against Defendants Joseph Hoffman, Jr. ("Hoffman"), Michael Wayne D'Amico ("D'Amico"), and Betty Lou D'Amico ("Mrs. D'Amico") for the alleged violations of Potter's rights when D'Amico recorded conversations with him. Defendant Hoffman and Defendants Mr. and Mrs. D'Amico² filed separate motions to dismiss. For the reasons stated below, these motions will be granted.

FACTS

Plaintiffs' cause of action allegedly arises out of an

¹ Potter purports to act pro se for himself and Gale Potter. Since he is not a member of the bar of this court, he may represent only himself, not Gale Potter. Thus, the motions to dismiss the claims by Gale Potter are essentially unopposed.

² Plaintiffs fail to state any cause of action against Mrs. D'Amico that resulted in injury to themselves. All references in the complaint to "D'Amico" appear to refer only to D'Amico. The complaint makes only three references to Mrs. D'Amico and never in reference to any injury to the Plaintiffs. Mrs. D'Amico accordingly is dismissed from this action for failure to state a cause of action against her upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

investigation by Stephen B. Brogan ("Brogan") of the Gloucester County Police Department into alleged drug activity of Potter in the spring of 1995. Hoffman, as D'Amico's attorney, advised D'Amico to tape record conversations with Potter because such cooperation with Brogan could delay the sentence for his own conviction. (Compl. ¶15.) Based on Hoffman's advice, D'Amico assisted Brogan by recording a series of conversations with Potter during which D'Amico and Potter arranged a drug deal. (Compl. ¶¶ 17, 20, 24-25, 28). Potter never consented to having these drug deals tape recorded. (Compl. ¶17.)

During the course of the investigation, D'Amico had several conversations with Brogan to arrange a drug deal with Potter. (Compl. ¶22.) Potter alleges D'Amico was not entirely truthful in his interaction with Brogan.³ (Compl. ¶22.) Brogan seemed aware the D'Amico could be untrustworthy. (Compl. ¶22.) The drug deal occurred April 4, 1995, in Deptford, New Jersey; D'Amico tape recorded the transaction. (Compl. ¶¶26-28). Potter was arrested and an investigation continued, without the assistance of D'Amico.⁴ (Compl. ¶¶29-37.)

Since Potter is proceeding pro se, the factual allegations in the complaint must be construed liberally. Gittlemacker v.

³ At a suppression hearing held after Potter's arrest, the Honorable Joseph Lisa agreed that D'Amico was not "a credible person." (Compl. ¶38.)

⁴ The complaint also makes several allegations against the police officers involved. (Compl. ¶¶29-37.) These allegations are irrelevant because the officers are not parties to this action.

Philadelphia County, 413 F.2d 84, 87 n.3 (3rd Cir. 1969); cert. denied, 396 U.S. 1046, 90 S. Ct. 696 (1970); Youse v. Carlucci, 867 F. Supp. 317, 318 (E.D. Pa. 1994). Applying this standard, the allegations in the complaint include: claims for civil rights violations under §§ 1981, 1983, and 1985; claims for violations of the Pennsylvania and New Jersey wiretapping laws; civil conspiracy; and defamation.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3rd Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3rd Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Random v. Marrazzo, 848 F.2d 398, 401 (3rd Cir. 1988). A motion to dismiss may be granted only "if appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

II. Personal Jurisdiction Over Hoffman

For a court to exercise personal jurisdiction over a defendant, "he [must] have certain minimum contacts with [the jurisdiction] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)(citation omitted). Contacts may include residence or business in the state.

This court, located in Pennsylvania, has subject matter jurisdiction over this action but no personal jurisdiction over Defendant Hoffman. Hoffman is a resident of New Jersey and works in that state. (Compl. ¶2.) The cause of action arose in New Jersey. Plaintiff has failed to demonstrate any ties between Hoffman and Pennsylvania sufficient to exercise personal jurisdiction over him. See 42 Pa. Con. Stat. Ann. §§5301-5365 (West Supp. 1998); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Int'l Shoe, 326 U.S. at 316.

III. Gale Potter's Action Against D'Amico

A person has standing to sue only if that person's rights have been violated. See Moose Lodge No. 197 v. Irvis, 407 U.S. 163, 166 (1972). Only in limited circumstances, not present in this action, may a person sue when the rights of another have been violated. See 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §3531.9 (2d ed. 1984 & Supp. 1998). Gale Potter has not plead the violation of any of her

rights. The complaint alleges violations of Potter's rights only. Gale Potter has no cause of action because Potter's rights were violated.

IV. Civil Rights Claims

The elements of a claim under §1985(3)⁵ are: "1) a conspiracy by the defendants; (2) designed to deprive plaintiff of the equal protection of the laws; (3) the commission of an overt act in furtherance of that conspiracy; (4) a resultant injury to person or property or a deprivation of any right or privilege of citizens; and (5) defendant's actions were motivated by a racial or otherwise class-based invidiously discriminatory animus." Carter F.-3999 v. Cuyler, 415 F. Supp. 852, 857 (E.D. Pa. 1976)(citing Griffin v. Breckenridge, 403 U.S. 88, 102-03; Pitt v. Coxe, 65 F.R.D. 355, 356 (E.D. Pa.1975); Mimms v.

⁵ Section 1985(3) states in relevant part:

If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Philadelphia Newspapers, Inc., 352 F. Supp. 862, 866 (E.D. Pa.1972)). To assert a §1985 claim, racial or other class-based animus must be plead. See Turner v. Philadelphia, 1998 WL 670019 (E.D. Pa. 1998); Carter F., 415 F. Supp. at 857.

To assert a §1981⁶ claim as well, Potter must allege that he is a member of a protected class and that D'Amico acted with intent to discriminate. See Mahone v. Waddle, 564 F.2d 1018, 1025 n.8 (3rd Cir. 1977); Jones v. Unisys Corp., 1996 WL 417220 (E.D. Pa. 1996). Potter concedes in his response to the motions to dismiss that he is not alleging racial animus. (Pl. Resp. ¶4.) Neither has he alleged any other class-based discrimination or that D'Amico acted with intent to discriminate. Potter has failed to allege the necessary elements for his §§ 1981 and 1985 claims.

A §1983 claim is not viable if recovery depends on invalidating plaintiff's conviction. See Edwards v. Bolisok, 520 U.S. 641(1997); Heck v. Humphrey, 512 U.S. 477, 487(1994). For Potter to recover on his §1983 claim, based on the allegedly illegal tape recordings, this court would have to determine the validity of his conviction. The validity of the conviction must

⁶ Section 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

be determined by habeas corpus or other available post-conviction remedy. See id.; see also 42 U.S.C. §§2241, 2254 (1998). Unless and until his conviction is invalidated, he may not recover on a claim under 42 U.S.C. §1983.

VII. Claims Under Wiretapping Laws

It is not a violation of the United States Constitution or federal law to record a conversation if one of the parties to the conversation consents to the recording. See United States v. White, 401 U.S. 745, 751-53 (1971). Potter may not recover under federal law because his conversations with D'Amico were tape recorded with D'Amico's consent.

The Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Con. Stat. Ann. §5701-5728 (West Supp. 1998), and the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J. Stat. Ann. §2A:156A-1 - 156A-34 (West Supp. 1998), generally protect against tape recording conversations, but both statutes exempt a party from liability for tape-recording if acting under the direction of an investigative officer. 18 Pa. Con. Stat. Ann. §5704(2)(i); N.J. Stat. Ann. §2A:156A-4(c). The complaint is unclear whether the recordings at issue occurred in Pennsylvania or New Jersey, but the location in this action does not change the result. Potter alleges that D'Amico acted at Brogan's direction or under his supervision; Potter may not recover under either Pennsylvania or New Jersey law for D'Amico's actions in tape recording their conversations.

VIII. Civil Conspiracy Claims

There is no liability for civil conspiracy unless there is liability for the act or acts underlying the conspiracy.

Pelagatti v. Cohen, 536 A.2d 1337, 1341 (Pa. Super. 1987); Board of Educ. of Asbury Park v. Hoek, 183 A.2d 633, 646 (N.J. 1962).

Potter's civil conspiracy claim is based on obstruction of justice. Pennsylvania law does not allow recovery of damages in a civil action for obstruction of justice. See Pelagatti, 536 A.2d at 1341-42.

To recover damages for civil conspiracy under New Jersey law, plaintiff must plead special damages. See Board of Educ. of Asbury Park v. Hoek, 168 A.2d 829, 835 (N.J. Super. 1961), rev'd on other grounds, Hoek, 183 A.2d 633. Special damages must be plead with specificity, Fed. R. Civ. P. 9(g); Potter has failed to plead special damages.

Even if there were a cause of action for obstruction of justice and special damages were plead, Potter fails to allege any facts constituting obstruction of justice by D'Amico. The complaint alleges only that D'Amico recorded conversations with Potter and assisted the police in an investigation. Even reading the complaint liberally in Potter's favor, the allegations do not establish that D'Amico impeded or interfered in any way with the police investigation or the subsequent trial of Potter. Helping to convict Potter for his role in drug dealing assisted rather than obstructed justice.

IX. Tort Claims

Reading the complaint liberally, the only tort that Potter has attempted to assert is defamation. To assert a defamation claim under Pennsylvania law, Potter must allege: "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion." Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185, 196 (3rd Cir. 1998)(citing 42 Pa. Cons. Stat. Ann. §8343(a)).

Similarly, under New Jersey law, Potter must allege that "the speaker knew the statement was false when communicated, that the statement was made with reckless disregard of its truth or falsity, or that the speaker acted negligently in failing to ascertain the falsity of the statement before communicating it." Kass v. Great Costal Express, Inc., 704 A.2d 1293, 1295 n.1 (N.J. 1998). Potter has failed to allege D'Amico made any defamatory statements about Potter or that any such statements were communicated to a third party and understood as defamatory.

CONCLUSION

The Potters' claims against Hoffman and Mr. and Mrs. D'Amico will be dismissed. This court cannot exercise personal

jurisdiction over Hoffman. Gale Potter does not have standing to sue for the alleged violations of Potter's rights. The complaint does not make any actionable allegations against Mrs. D'Amico.

Potter has asserted no actionable claims against D'Amico. Potter has failed to plead racial animus, a necessary element for both §1981 and §1985 claims. Potter may not assert a §1983 claim that will result in the invalidation of his conviction. Potter has no claim under federal law because his conversations with D'Amico were recorded with D'Amico's consent. D'Amico is exempt from liability under the Pennsylvania and New Jersey Wiretapping and Surveillance Control Acts. Potter's civil conspiracy claim must be dismissed because no civil cause of action exists for obstruction of justice, and Potter has not plead special damages with specificity. He also has not alleged any facts that would indicate D'Amico obstructed justice. Finally, Potter has not alleged facts constituting a defamation claim or any other tort violation. Since no cause of action is stated, any issue regarding the statute of limitations is moot.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES ALAN POTTER &	:	CIVIL ACTION
GALE L. POTTER	:	
	:	
v.	:	
	:	
JOSEPH HOFFMAN, JR.,	:	
MICHAEL WAYNE D'AMICO &	:	
BETTY LOU D'AMICO	:	NO. 98-406

ORDER

AND NOW, this 24th day of November, 1998, upon consideration of defendants' motions to dismiss and all responses thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Defendant Hoffman's motion to dismiss is **GRANTED** for lack of personal jurisdiction. This action is dismissed without prejudice to a suit brought in the proper court as to defendant Hoffman only.

2. Defendants' Mr. and Mrs. D'Amico's motion to dismiss is **GRANTED** with prejudice for failure to state a claim upon which relief can be granted.

Shapiro, J.